SUPREME COURT, U. S.

FILED

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 644

JACOB J. FROHMANN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Jacob J. Frohmann prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above styled case on July 27, 1967, affirming the judgment of the United States District Court for the Eastern District of Missouri, Eastern Division and the sentence of imprisonment of Petitioner for violation of 26 U. S. C., Section 7203. On August 24, 1967, the Court of Appeals denied a petition for rehearing.

CITATION TO OPINION BELOW.

The judgment of the United States Court of Appeals is printed in Appendix A, infra. The opinion of the United States Court of Appeals is also printed in Appendix A, infra, and is reported at 29 AFTR, par. 5244.

JURISDICTION.

Petitioner was tried and convicted in the United States District Court for the Eastern District of Missouri, Eastern Division on both counts of a two count information, each charging him with violation of 26 U. S. C., Section 7203. The District Court entered judgment and sentenced him to one year imprisonment on each count to run concurrently. On July 27, 1967, the Court of Appeals for the Eighth Circuit entered its judgment affirming the judgment of the District Court. On August 24, 1967, the Court of Appeals denied a petition for rehearing. Petitioner invokes the jurisdiction of this Court to review the opinion and judgment of the Court of Appeals by a writ of certiorari under 28 U. S. C., Section 1254 (1).

STATUTES INVOLVED.

Title 26, U. S. C., Section 7203.

Willful Failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply

such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Federal Rules, Criminal Procedure 52 (b), 28 U. S. C. A.

Harmless Error and Plain Error.

(b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Constitution of the United States Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

QUESTIONS PRESENTED.

I.

Whether the testimony of a government witness Revenue Agent, admitted over petitioner's objection, of the statement and admission of the petitioner as to why he had failed to file income tax returns, constituted evidence obtained against him in violation of petitioner's

constitutional right against self-incrimination, such statement having been obtained under questioning by a Special Agent of the Internal Revenue Service after the matter had been referred to the intelligence unit but without petitioner's knowledge that he was under criminal investigation.

II.

Whether, under all of the circumstances of the case, petitioner was substantially prejudiced and denied a fair and impartial trial considering the actions and rulings of the trial judge in excluding evidence offered by petitioner in his own defense and to meet the government's evidence, and in asking questions of petitioner's witness in such a way as to express his opinion on a vital issue of the case.

III.

Whether or not 26 U. S. C., Section 7203 under which defendant was convicted is invalid as being in violation and contravention of the right against self-incrimination guaranteed by the Fifth Amendment to the Constitution.

STATEMENT.

(All references are to pages in the typewritten transcript of the proceedings in the District Court duly certified by the Court of Appeals, unless otherwise noted.)

Petitioner was convicted in a jury trial on both counts of an information charging him, respectively, with wilful failure to file an income tax return for the year 1959, although having a gross income of $54,194.44, and of wilful failure to file an income tax return for the year 1960, although having a gross income of $35,830.47, both counts in violation of 26 U. S. C., Sec. 7203.

Petitioner was engaged in the business of developing and dealing in commercial real estate properties.

Government witnesses identified petitioner's tax returns for the years 1958 through 1964, and the returns for 1959 through 1962 were received in evidence (Tr. 15). These witnesses, employees of Internal Revenue Service, testified to taxpayer's complete history, including dates of filing, assessment and payments for the years 1950 through 1964 and the fact that returns for the years 1958 through 1964 were delinquent (Tr. 28, 29, 30).

The Government called approximately 33 additional witnesses who testified concerning their business transactions with petitioner and introduced numerous documents relating to these transactions. Petitioner's bank ledger from December, 1958 through February, 1962 was introduced (Tr. 258).

Revenue Agent Parker first contacted petitioner on July 29, 1961 (Tr. 291) and requested records from which he could determine his income for the years 1958, 1959 and 1960 (Tr. 293). A Mr. Kuehn came to Parker's office and said he was a lawyer representing petitioner and filed the 1958 return in July, 1962 (Tr. 296). Kuehn delivered petitioner's records to Parker.

The matter was referred to the intelligence unit, leading to a meeting on August 16, 1962 at which petitioner told a Special Agent he failed to file his returns because he did not have the money to pay the tax (Tr. 296, 297, 298, 299). Testimony concerning this statement is the basis for point I. of this petition.

Special Agent Noelker testified to a summary showing that petitioner's gross income for 1959 was $55,502.41 (Tr. 334) and for 1960 his gross income was $36,522.50. Petitioner's 1960 return introduced by the Government without limitation showed a loss of $50,362.63. Special

Agent Noelker testified as to the reasons and respects in which petitioner's return was incorrect (Tr. 349).

Petitioner's accountant was not permitted to testify as to the details of the computations used in the return or to show why such computations were used. This question remains an issue in this case under point II.

Petitioner was born in 1910 of uneducated immigrant parents who spoke little English. He completed only the fifth grade of school at age 16, having been returned to the old country and apprenticed in a dry goods store for five years. He was a barber until becoming interested in the real estate business in the 1930's and about 1940 began dealing in real estate for his own account in a small way. He has never held a broker's license.

Petitioner always worked out of his home except when he had desk space in the real estate office of Government witness Brinkop between 1955 and 1963. He had never kept books and his only records were the papers of a transaction which he would keep together, and starting in 1950 a Mr. Kuehn, whom he had known in the real estate business, prepared his returns. As his transactions became more complicated, he still failed to keep any books or change his method of keeping records (Tr. 487, 488).

If petitioner had income property, it was always managed by someone else. He did not prepare one single document in connection with the transactions mentioned in evidence. Government witness Brinkop, with whom petitioner had desk space for eight years, said he never saw petitioner do so much as write a letter and that although he had an unusual ability to remember matters connected with real estate, petitioner had no knowledge of any other transactions in the world (Tr. 255).

Petitioner attempted to introduce the Court files in three civil suits against him in which very substantial judgments were taken against him by default, such evi-

dence being offered to show a habit of neglect of other matters of importance to him and his lack of the business acumen claimed by the Government (Tr. 425, 426, 427). The refusal of the trial Court to admit this evidence is considered in the issue raised under point II.

REASONS FOR GRANTING THE WRIT.

I.

The Court below has held that the statement of petitioner as to why he failed to file his income tax returns under interrogation of a Special Agent of the Internal Revenue Service was not obtained in violation of petitioner's constitutional rights under the Fifth Amendment and was admissible in evidence.

This decision is in conflict with the principles of law respecting waiver of constitutional rights as set forth by this Court in the cases of Miranda v. Arizona (1966), 384 U. S. 436 and in Escobedo v. Illinois (1964), 378 U. S. 478.

Certainly, there is an important question of Federal law which has not been but should be settled by this Court. Apparently, it was for the latter reason that Mr. Justice Douglas urged the granting of a petition for certiorari upon this question in his dissent to the denial of certiorari in the case of Thomas v. United States (1967), 386 U. S. 975.

Although on the facts no Circuit Court of Appeals has yet extended the protection of the Fifth Amendment to non-custodial questioning, there does appear in the various opinions to be a distinction arising as to the application of the Escobedo-Miranda rule indicating the need and desirability of a determination of the question by the Supreme Court.

For example, in Kohatsu v. United States (9 Cir. 1965), 351 F. 2d 898 the opinion refused to extend the Escobedo rule on the grounds that the investigations of the Revenue Agents at that point were to determine whether, in fact, any crime had been committed and while so engaged, the accusatory stage had not yet been reached. Similarly, in the instant case, the opinion of the Eighth Circuit sets out under point B that,

> "* * * we are not satisfied, either, that this record shows that the investigation had attained what is described as the accusatory stage * * *".

In so doing, both the Ninth Circuit and the Eighth Circuit have indicated that the accusatorial stage requiring procedural safeguards may be reached in a non-custodial situation.

On the other hand, in United States v. Maius (6 Cir. 1967), 378 F. 2d 716 the Sixth Circuit indicates that it would require an in-custody interrogation and makes no mention of the question of the accusatory stage as a guideline. It is worthy of note also that at p. 719 of the Maius opinion, the Court indicates its feeling that existing procedures of the Internal Revenue Service might be unfair but that,

> "* * * Until we are told by superior authority that a citizen's constitutional rights are imperiled by such procedure, we are constrained to hold that the evidence is admissible. * * *"

Several of the District Courts have applied the Miranda rule to tax cases indicating by comments that there is judicial concern of the unfairness of denying a taxpayer constitutional safeguards afforded to perpetrators of violent crimes. United States v. Turzynski, 67-2 USTC, par. 9489 (N. D. Illinois 1967); United States v. Kingry, 67-1 USTC, par. 9262 (N. D. Florida 1967).

The essence of the legal principle of Miranda and Escobedo is that a waiver of constitutional rights is fundamental with respect to the Fifth Amendment privilege and requires an intelligent and free choice based upon knowledge. See Miranda v. United States, 384 U. S. at p. 476. The rule was then applied on the facts to in-custody interrogations.

In the instant case, petitioner had no knowledge that his case had moved from a routine tax to a criminal investigation (Tr. 483, 484) and there was no evidence to the contrary. Such knowledge of the nature of the proceeding, which is certainly an adversary proceeding, is essential to a free and intelligent choice. By analogy, failure to furnish the taxpayer with such information is akin to the concealment of a material fact upon which, in civil law, a contract may be avoided as lacking essential consent.

In this case and others with similar facts, the Courts of Appeals have found a waiver of constitutional rights although the defendant lacked essential knowledge, contrary to the principles of law laid down in the Miranda and Escobedo cases.

Most of the decisions of the Courts of Appeal including the instant case where the question was briefed by petitioner have failed to consider the issue that the elements of psychological duress discussed in Miranda and Escobedo are likewise applicable to non-custodial interrogation. However, in United States v. Maius (supra), 378 F. 2d 716, the Sixth Circuit recognized that few citizens have the toughness of fiber or technical knowledge to refuse to answer in an interview but held that this was not duress or arrest in the legal sense.

The instant case is a failure to file case in which the Revenue Agent had knowledge of Petitioner's failure to

file and that he had substantial gross income to require filing before the matter was referred to the intelligence unit and the meeting of August 16, 1962. The interrogation as to why he failed to file could have nothing to do with a routine investigation.

If, therefore, the application of the Miranda-Escobedo rule should turn on the question of when the matter reaches the "accusatory" or "adversary" stage, this case is peculiarly adapted for consideration by this Court.

Since the opinion of the Court of Appeals in the instant case under Point B has indicated that the Miranda-Escobedo question is not squarely presented, Petitioner is compelled now to meet that issue. In its opinion the Court of Appeals held that the Trial Court could properly conclude that Mr. Kuehn, who attended the meeting of August 16, 1962 with Petitioner, attended that meeting in the capacity of attorney for Petitioner. The opinion admits, however, that the record did not positively demonstrate that Petitioner retained Kuehn as an attorney nor positively demonstrate he did not so retain him.

The only evidence that Kuehn was an attorney was the testimony of the Revenue Agent that shortly after July 29, 1961 (a year prior to the conference), Kuehn came to his office and discussed the returns and that "Kuehn said he was an attorney representing Mr. Frohmann" (Tr. 293). This testimony was obtained from the Revenue Agent in connection with other preliminary matters and before Petitioner's counsel had any knowledge of a meeting on August 16, 1962 or of any statement made by petitioner.

Petitioner did not hire Kuehn as a lawyer and the hearsay testimony of Agent Parker as to the hearsay statement of Kuehn to him a year prior to the meeting was not sufficient in probative value to establish his

agency as attorney for Petitioner. In United States v. Consolidated Laundries Corp. (2 Cir. 1961), 291 F. 2d 563, the opinion states at p. 576,

> "It is axiomatic that agency cannot be proved solely by the declarations of the alleged Agent, but must be established by independent proof. * * * The independent proof may be circumstantial but it must be 'substantial' (citing cases), and not too slight."

Certainly the testimony of the Revenue Agent as to what Kuehn told him, coming in by inadvertence on a different subject where it was not material does not meet the standard of proof for waiver of constitutional rights reiterated in Miranda v. Arizona, 384 U. S. at p. 475,

> "* * * This Court has always set high standards of proof for the waiver of constitutional rights * * *".

Petitioner knew Kuehn as a real estate man who prepared income tax returns and prepared Petitioners for all years commencing in 1950 (Tr. 475) and he gave Kuehn his records for 1959 and 1960 to prepare his returns (Tr. 487) and permission to deliver them to the Revenue Agent (Tr. 493). He also prepared and filed his late 1958 return in 1962 prior to the meeting in question.

The Eighth Circuit has held that the attorney client relationship is not established by hiring an attorney merely to prepare income tax returns. Canaday v. United States (8 Cir. 1966), 354 F. 2d 849.

Petitioner had no knowledge that he was under anything other than routine tax investigation and the presence of Kuehn at the meeting under the circumstances is service of a nature frequently, if not usually, performed by persons other than lawyers who assist taxpayers with their returns.

The Government interviewed and subpoenaed Kuehn to testify but the marshal returned and advised the Court

that Kuehn was approximately 86 years old and could not testify without danger to his health (Tr. 524, 525). During testimony of a witness, the Trial Court acknowledged that Kuehn was not competent to advise defendant in the preparation of tax returns (Tr. 411, 420). In fact, the record also reflects that petitioner hired others to represent him in legal matters (Tr. 208).

Even if Kuehn might be said to have acted as a lawyer for petitioner at the meeting of August 16, 1962 and was competent to do so, he could not have properly advised Petitioner without being informed himself as to the nature of the proceedings. His mere uninformed presence did not create a waiver of a basic constitutional right otherwise reserved to petitioner.

Also under point B. the opinion of the Court of Appeals mentions that there is no apparent inconsistency between petitioner's statement to the Special Agent and his testimony. This overlooks the holding of this Court in Miranda that the constitutional prohibition applies to exculpatory as well as inculpatory statements. Further, petitioner's alleged statement to the Agent that he did not file because he didn't have the money to pay the tax on its face was inconsistent with Government Exh. 51, Petitioner's bank ledger, introduced to show that he had funds on deposit (Tr. 257, 258, 259, 260).

Petitioner submits that the Escobedo-Miranda issue is properly before this Court for consideration of the issuance of a Writ of Certiorari.

II.

This case was tried by jury and petitioner contends he was substantially prejudiced by a combination of actions of the trial judge, including his rulings denying the introduction of certain evidence offered by defendant; certain

questions asked by the Court of defendant's witness Mueller; and by certain of the Court's comments during the examination of the witness Mueller.

That the trial court's actions may well be justified under existing practice is indicated by the support he received in the opinion of the Court of Appeals at points C. and D. For this reason, if there is merit to petitioner's contention, certiorari should be granted because of the importance of the question for the administration of criminal justice in the Federal Courts as in Kotteakos v. United States, 66 S. Ct. 1239 (1946).

> The trial Court properly instructed the jury that, "* * * mere laxity, careless disregard of the duty imposed by law, or even gross negligence, unattended by evil motive are not proof of a wilfull act on the part of the Defendant." (Tr. 557). United States v. Vitiello (3 Cir. 1966), 363 F. 2d 240.

Petitioner's excluded evidence includes (a) Defendant's Exhibits C, D and E, the Civil Court files of lawsuits against him summarized here in Appendix C, and (b) the proffered testimony of his accountant witness Mueller concerning his methods and computations used in preparing petitioners's 1960 tax return introduced in evidence by the Government. This latter testimony and the offers of proof and rulings of the Court rejecting the evidence as immaterial are contained in Tr. pp. 412 to 421.

The civil court's file exhibits reflect careless inattention by petitioner with final judgments taken against him by default in the total amount of approximately $37,000.00, and in Exhibit E a default pending only final inquiry in the approximate sum of $29,000.00.

These exhibits were offered in defense to show a pattern and habit of negligence by petitioner in other affairs of great importance to him which the jury in considering

his intent could compare with his failure to file tax returns, and also to meet the greatly emphasized Government evidence of petitioner's shrewdness and business acumen. In this habit of neglect undoubtedly lay the real cause of petitioner's tax problems as is further illustrated by his failure to have returns filed after he was contacted by a Revenue Agent only a few months after the 1960 return was due. It is difficult to conceive of more cogent and persuasive evidence in defense than that rejected by the trial court.

Similarly, petitioner sought to introduce evidence to show the methods and computations used in preparing his 1960 return to meet the Government's evidence that the petitioner had a substantial taxable income, although his return (introduced in evidence by the Government without limitation) showed a loss.

The effect of this evidence was to indicate to the jury a continuing design of petitioner to cheat the Government, which petitioner was not permitted to meet.

In its opinion, the Court of Appeals held the exclusion of all of the foregoing evidence to be within the Court's discretion as remote and irrelevant. This would appear to be in conflict with other decisions permitting the introduction of evidence to meet that of the other side though otherwise inadmissable. Hartman v. United States (8 Cir. 1954), 215 F. 2d 287; United States v. Lowe (3 Cir. 1956), 234 F. 2d 919.

Petitioner contends that all of the above evidence was admissible and essential to his defense. Considering this evidence in the context of the trial of the entire case, it should be noted that the testimony of the various Government witnesses concerning business transactions with petitioner were used by the Government as evidence of his business acumen affecting wilfulness. That the Court,

and undoubtedly the jury, were so impressed is illustrated by the comment of the Court outside the hearing of the jury during the Government's case in part, as follows (Tr. 155):

> "* * * a man who deals in business in this manner certainly should know that he has got to file a tax return".

Petitioner was repeatedly denied cross-examination of these Government witnesses to compare their orderly business practices with those of petitioner which would have demonstrated his lack of business acumen.

When considered in the context of the entire case, the refusal to admit the evidence and testimony here complained of effectively stripped petitioner of all evidence in his own behalf other than his own testimony, the truth of which the jury was instructed to consider in relation to petitioner's very grave interest in the case (Tr. 558).

Petitioner submits that under the circumstances, the discretion of the trial court on matters of evidence has been expanded to justify a curtailment which kept from the jury relevant and important facts critical to petitioner's defense, analogous to the rulings which this Court found sufficiently prejudicial to require reversal in Gordon v. United States (1952), 73 S. Ct. 369.

During the testimony of defendant's witness Certified Public Accountant Mueller, the Court interposed the following questions (Tr. 421):

> "The Court: Let me ask you another question, Mr. Mueller.
>
> The Witness: Yes, sir.
>
> The Court: Isn't it quite common for people who are not able to prepare a return to hire an accountant to do it?

The Witness: Yes, sir.

The Court: And when they don't have sufficient records to make a return, if they go to the Government and ask for an extension, can't they get all the time they need to get the records to make a return if they go timely?

The Witness: Usually; yes."

From the form of these questions, the trial Court indicated he considered petitioner's failure to hire an accountant or get an extension of time to be practically conclusive of his wilfulness, which certainly the jury might infer, and the Court thereby became a witness against petitioner expressing an opinion on the critical issue of the case. This the Court may not do. **Quercia v. United States** (1932), 289 U. S. 464. To have interposed an objection after the questions would have been futile to overcome the impression on the jury, and such questions constituted plain error under F. R. Cr. P. 52 (b), 28 U. S. C. A.

The witness Mueller was petitioner's only other witness on matters of substance other than petitioner. During the direct examination, the Court on at least five occasions indicated his impatience and desire to move the questioning rapidly along, on one occasion urging counsel to get the witness off the stand unless he had a question that the Court thought was material (Tr. 401, 405, 409). In general, the questions which were being asked concerned the preparation of the 1958, 1959 and 1960 returns, and the witness had been testifying only a very short time. The jury could not help but infer that the witness had absolutely nothing of value to offer.

This condition could only add to the prejudicial effect of reducing petitioner's defense to his own mere testimony.

In determining the prejudicial character of all of the matters complained of under this point II, they must be

considered in the light of the entire case in considering the effect upon the jury. The Government's case consisted of 38 witnesses and 66 exhibits, of which 60 were introduced in evidence (Tr. xiv) and the Government's case commenced at 2:00 p. m. on July 25, 1966, concluding at 12:15 p. m. on July 27, 1966 (Tr. 13, 374), whereas Appellant's case commenced at 1:30 p. m. on July 27, 1966 and concluded at 5:30 p. m. of the same afternoon (Tr. 374, 524).

The Government's case included testimony and documentary evidence in detail concerning petitioner's entire record of tax returns, assessments and payments covering the entire period 1950 through 1964 (Tr. 14, 15, 24, 25), including the showing that the tax returns for the years 1958 through 1964 and each of them were delinquently filed, which was made the most of in the Government's argument (Tr. 547). Petitioner's bank ledger for the entire period December, 1958 through February, 1962 was received in evidence over objection (Tr. 258, 259, 260).

In striking contrast to the above, the Court repeatedly limited petitioner's evidence in point of time to the periods concerning the 1959 and 1960 returns and the due dates thereof.

In many instances the actions of the trial Court in ruling on matters of procedure, cross-examination, admission of testimony and evidence, comments in the presence of the jury and questions of defendant's witness might each, standing alone, be generally within the latitude and discretion of the Court. But when, as here, such rulings are in marked contrast to the latitude permitted the Government and have the effect of eliminating independent evidence in defense and to meet the Government's evidence, and reduce the defense to the mere testimony of petitioner, then petitioner submits that the question may properly be considered as one for review by the Supreme Court to determine if such procedure is prejudicial.

III.

In United States v. Sullivan (1927), 274 U. S. 259, this Court held that although illegally received income must be reported, nevertheless 26 U. S. C., Sec. 7203 was constitutional since the taxpayer could claim the privilege against self-incrimination on the tax form required to be completed and filed.

More recently, in Costello v. United States (1966), 383 U. S. 942, Opinion 352 F. 2d 848, this Court granted certiorari to consider the question of the constitutionality of the Federal wagering tax statutes under the Fifth Amendment in connection with possible self-incrimination under criminal laws of the states.

The Sullivan case did not consider the requirement of Sec. 7203 requiring persons to "supply any information" required by the statute or regulations, which could now be a matter of public concern, in view of the ever increasing authority of administrative agencies. Furthermore, dissemination of tax returns is increasing and returns are available to the taxing authorities of the various states where there is no real control to prevent surreptitious use to initiate or aid in criminal investigations by state authorities.

Thus, the danger of self-incrimination of taxpayers in completing forms or supplying other information has substantially increased.

Further, if a taxpayer includes incriminating information in his return, he has essentially waived his constitutional privilege. The statute itself is a compulsion to furnish the incriminating information since taxpayers do not know that they may claim the privilege in preparing the form. It would seem that the standards for waiver of privilege laid down in Miranda v. Arizona (1966), 384 U. S. 436, have not been met.

The constitutionality of this section, therefore, may well be considered an important question of Federal law to be settled by this Court.

Petitioner wishes to advise the Court that this question of the constitutionality of 26 U. S. C., Sec. 7203, was not originally briefed to the Court of Appeals and was submitted to the Court of Appeals for the first time in petitioner's petition for rehearing.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 22, 1967.